



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Number: **200935041**
Release Date: 8/28/2009

Date: June 3, 2009

Contact Person:

Identification Number:

Telephone Number:

Employer Identification Number:

UIL: 501.00-00

Legend:

Club =
Building =
Local Newspaper =

Dear :

We have considered your ruling request dated April 24, 2008, and all supplemental submissions, concerning the federal income and excise tax consequences under section 501 of the Internal Revenue Code of 1986, as amended (hereafter "Code"), related to a proposed amendment of a prior historic preservation agreement in the manner and for the purposes described below.

Facts:

You have been recognized as a publicly supported charitable organization exempt under section 501(c)(3) of the Code and classified within the meaning of sections 509(a)(1) and 170(b)(1)(A)(vi). Your Articles of Incorporation list your specific charitable and educational purposes as dedicated to preserving and memorializing the history and architecture of the city in which you are located, with particular reference to the Club, which is located within the city; to research, restore and insure the preservation of buildings, land, homes or other articles which may relate to the history and architecture of the city, with particular reference to the Club; and, to accept donations for the above purposes.

The Club is a private social club that has been recognized as an organization exempt under section 501(c)(7) of the Code. The Club currently owns and occupies the Building, which is located within the city, which has been recognized as a historic building, and which has been

listed on the National Register of historic buildings and landmarks. Previously, the exterior facade of the Building was in need of restoration to preserve its historical and architectural value. You executed a written Agreement with the Club, under which you raised public funds to be used for the exterior restoration of the Building in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties and the Secretary of the Interior's Guidelines for Preserving, Rehabilitating, Restoring and Restructuring Historic Buildings (hereinafter, "The Secretary of the Interior's Standards and Guidelines."). The same Agreement was also executed by the National Trust for Historic Preservation in the United States (hereafter "National Trust"). The National Trust was established under the National Historic Preservation Act of 1966 (80 Stat.915, 16 U.S.C. 470 et seq.), which declared it a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. The National Trust was established as a charitable and educational nonprofit corporation whose purpose is to receive donations of sites, buildings and objects significant in American history and culture, and to preserve and administer gifts of money, securities, or other property of whatsoever character for the purpose of carrying out the preservation program. As part of the Agreement, the National Trust agreed to review and approve your restoration project of the exterior of the Building to ensure that the public funds you raised were utilized on materials and methods that met the requirements of the Secretary of the Interior's Standards and Guidelines for historic preservation, and not for the private benefit of the Club or its members. Any modifications to the Agreement would require the advice and consent of the Exempt Organizations Division of the Internal Revenue Service.

Following the execution of the Agreement, you raised public funds for the extensive preservation, restoration and repair of the exterior of the Building, which restoration you report was undertaken in accordance with the Secretary of Interior's Standards for Preservation Projects and approved by the National Trust. Currently, in accordance with the Agreement, you request the advice and consent of the Exempt Organizations Division of the Internal Revenue Service to amend the Agreement in order to permit you to undertake a restoration project of several of the interior rooms of the Building. The Amended Agreement has been annexed to your ruling request, with several key provisions summarized below.

The Amended Agreement expands your funding authority to include raising public funds for the preservation, restoration or repair of only those interior spaces of the Building that have been designated as historically important by an independent architectural expert and so designated in the Amended Agreement as "Designated Interior Historic Spaces." The Designated Interior Historic Spaces are comprised of several rooms in the front of the Building located on the first and second floors. The Amended Agreement would also require that all work would be performed with materials and methods that meet the requirements of the Secretary of the Interior's Standards and Guidelines. The National Trust would be required to review and approve any restoration project of any Designated Interior Historic Spaces.

You represent that currently the interior of the Building, including the Designated Interior Historic Spaces, are primarily accessible only to Club members, with the Building primarily used by the Club as offices for Club business and for social functions. You further represent that fourteen (14) residential rooms at the Club are located within the areas of the Designated Interior Historic Spaces, with several Club members and guests utilizing those rooms for overnight lodging. Scholars and other educational or architectural groups interested in the

Building's historic character have access to the interior portions of the Building only when sponsored by a Club member or holders of privilege cards (spouses and widows/widowers of deceased members). However, persons who attend seminars, meetings, receptions and cultural events in the Building, which are scheduled pursuant to approval by the Club, have access to the interior portions of the Building during these events. You represent that in 2007, approximately 819 seminars, meetings, receptions and cultural events were held at the Building, over a period of 294 days, in which non-members of the Club accounted for approximately 34,312 attendees at those events. You further represent that in the first half of 2008, approximately 483 seminars, meetings, receptions and cultural events were held at the Building, over a period of 159 days, in which non-members of the Club accounted for approximately 20,207 attendees at those events.

You represent that the Amended Agreement would increase public access to the Designated Interior Historic Spaces. Specifically, paragraph 4 of the Amended Agreement as modified by your submission dated March 19, 2009, provides for increased public access in the following manner:

4. The Club further agrees that the Designated [Interior] Historic Spaces [of the Building] shall be made available to the general public in the following manner:

(a) The general public will be given the opportunity to tour the Designated Historic Spaces on a given day every other month throughout the year;

(b) Organizations of architects, engineers, historians or others whose professional or academic pursuits are concerned with the creation, preservation or restoration of historic buildings may arrange to tour the Designated Historic Spaces at a time mutually agreed to by the Club and the organizations.

(c) No member sponsorship will be required to participate in the tours described in (a) or (b). The Club will accept reservations for such tours by telephone or on the Internet.

(d) In addition, the Club agrees to make virtual tours available through the Internet via video and/or photographs or other media access.

You have represented in your submission dated February 27, 2009, that you will notify the Local Newspaper's weekend staff as to when tours are given so they can publish this information in their weekend edition. Furthermore, this same information will be displayed prominently on your web site, along with the ability for the public to make reservations for tours either via your web site or via telephone. Also in your submission dated February 27, 2009, you make it clear that there will be an "[u]nlimited number of tours [of the Designated Interior Historic Spaces of the Building] for professional groups interested in historic preservation and restoration."

The Amended Agreement also provides that you will reimburse the National Trust for staff time and expenses involved in reviewing all project plans, specifications, proposals and related documentation for the preservation of the Club's Building. Specifically, the Amended Agreement provides that "[t]he staff reimbursement rate shall be the market rate for architectural

review plus eighteen percent (18%) administrative overhead expenses." You represent that "[n]o Club member, guest, or member of the public will be charged for the opportunity to see the Designated Spaces, either in person or on the Internet." If the Building is ever sold, the Amended Agreement provides that the Club will reimburse the Foundation "the current value of all projects undertaken by the Foundation for the purpose of historically preserving the [Club's Building]."

You have requested the following ruling:

Your agreement to the terms of the Amended Agreement, your performance of those terms, and your acceptance of contributions to be utilized to defray the costs of the preservation and restoration in a manner consistent with the Amended Agreement will not adversely affect your tax exemption under Code Section 501(c)(3).

Law:

Section 501(c)(3) of the Code provides, in part, for the exemption from Federal income tax of organizations that are organized and operated exclusively for charitable purposes, provided no part of the net earnings of the organization inures to the benefit of any private individual or shareholder.

Section 1.501(c)(3)-1(c)(1) of the Income Tax Regulations (hereafter the "regulations") provides, in part, that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities that accomplish one or more of such purposes described in section 501(c)(3) of the Code, but will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides, in part, that an organization is not operated exclusively for exempt purposes "unless it serves a public, rather than a private, interest." Thus, it is necessary for an organization to establish that "it is not operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests."

Section 1.501(c)(3)-1(d)(2) of the regulations provides that the term charity includes, but is not limited to, "erection or maintenance of public buildings, monuments or works."

Rev. Rul. 75-470, 1975-2 C.B. 207, describes a nonprofit organization that was formed to promote an appreciation of history through the acquisition, restoration, and preservation of buildings having special historical or architectural significance. After restoration was completed, the buildings were open to the general public for viewing. The organization was financed with admission fees to the restored buildings. The Service held that "[t]he organization is carrying on activities similar to those of a museum and is educational and charitable within the meaning of section 501(c)(3) of the Code."

Rev. Rul. 86-49, 1986-14 I.R.B. 7, describes an organization that was formed for the purpose of preserving the historical and/or architectural character of a community through the acquisition, restoration, and subsequent sale of historically and/or architecturally significant properties, subject to restrictive covenants. The Service held that the organization would qualify as an organization that is organized and operated exclusively for charitable or educational purposes under section 501(c)(3) of the Code. The organization sold the properties to private parties in arms-length transactions subject to restrictive covenants designed to ensure public access to the properties; thereby, preserving the properties for the public's benefit. Where the properties were not visible from the public right of way "the organization provides in the restrictive covenants that visual access to the property will be made available to the public on a regular basis and the terms of the restrictive covenants contain prescribed conditions for such access, under the requirements set forth in section 1.170A-14(d)(5)(iv) of the Income Tax Regulations."

In Better Business Bureau v. United States, 326 U.S. 279, 66 S.Ct. 112, (1945), the Supreme Court ruled that an organization that is tax-exempt as an educational institution must be devoted to educational purposes exclusively, and the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly educational purposes.

In Columbia Park and Recreation Association v. Commissioner, 88 T.C. 1 (1987), an organization that was organized to develop and operate utilities, systems, services and facilities for the common good and the social welfare of the homeowner's association within the planned community, sought tax-exempt status under section 501(c)(3) of the Code. The Tax Court found that the majority of services and facilities the organization provided were only offered to association members, with only a small fraction of those services actually offered to the general public, with the public paying higher rates than association members for the same services. The Tax Court held that the organization was not organized or operated as charitable within the meaning of Section 501(c)(3).

Analysis:

You intend to engage in the activities outlined in your Amended Agreement and expend public funds for the repair, restoration and preservation of certain interior spaces of the Club's Building that have been labeled as "Designated Historic Interior Spaces." The issue therefore arises whether the public is given substantial access to the Designated Interior Historic Spaces to justify your expenditures of public monies to restore these spaces, which are currently owned and utilized by a private social club, so as not to violate your tax-exempt status under section 501(c)(3) of the Code. If the public does not have substantial access to these areas for viewing, then you would have expended public funds for the private benefit of the Club and its members, in violation of your tax-exempt status under section 501(c)(3) of the Code.

Under section 501(c)(3) of the Code, an organization that is exempt from Federal income tax must be both organized and operated exclusively for charitable or educational purposes, and must provide that no part of the net earnings of the organization inures to the benefit of any private shareholder or individual. The term charity includes, but is not limited to, "erection or maintenance of public buildings, monuments or works." Section 1.501(c)(3)-1(d)(2)

of the regulations.

An organization is not organized and operated exclusively for charity "unless it serves a public rather than a private interest." Section 1.501(c)(3)-1(d)(1)(ii) of the regulations. The presence of private benefit, if substantial in nature, will destroy the organization's tax-exempt status regardless of whether the organization has other charitable purposes or activities; however, where private benefit is incidental to the accomplishment of an organization's charitable or educational purposes, it will not prevent the organization from being described in section 501(c)(3) of the Code. See Section 1.501(c)(3)-1(c)(1) of the regulations; Better Business Bureau of Washington, D. C., Inc. v. United States, 326 U.S. 279 (1945).

Several court cases and revenue rulings have focused on the issue of whether the public's access to an organization's facilities is substantial. In Columbia Park and Recreation Association v. Commissioner, 88 T.C. 1 (1987), the Tax Court denied an organization's 501(c)(3) status on the grounds that the public's access to the organization's facilities were not substantial. The Court found that only a small percentage of the organization's total assets, and a rather limited percentage of the organization's total budget, were actually spent on facilities and services that were open to the public, with the remainder of the organization's assets and budget spent on facilities only open to the organization's members. This is contrasted with Rev. Rul. 75-470, 1975-2 C.B. 207, in which the organization's facilities were deemed to be substantially open to the public. In Rev. Rul. 75-470, an organization qualified for tax-exemption under 501(c)(3) of the Code for its activities of acquiring and restoring buildings having historical and/or architectural significance. After restoration was completed, the buildings were open to the public for viewing. The Service found that the public's access to the interiors of the buildings was substantial because the organization was operating the buildings as museum exhibits, which were open regularly for public viewing. Furthermore, in Rev. Rul. 86-49, 1986-14 I.R.B. 7, the Service held that an organization that was formed for the purpose of restoring historical and/or architecturally significant buildings and subsequently selling the same buildings was sufficient to qualify the organization under section 501(c)(3) of the Code because the buildings were sold with restrictive covenants that permitted substantial public access to the buildings.

In Rev. Rul. 86-49, the charitable organization sold properties subject to restrictive covenants designed exclusively to preserve and to allow for public viewing of the historical and/or architecturally significant properties. Where the properties were not visible from the public right of way "the organization provides in the restrictive covenants that visual access to the property will be made available to the public on a regular basis and the terms of the restrictive covenants contain prescribed conditions for such access, under the requirements set forth in section 1.170A-14(d)(5)(iv) of the Income Tax Regulations." Id. Specifically, section 1.170A-14(d)(5)(iv) of the regulations provides the following:

Where the historic land area or certified historic structure which is the subject of the donation is not visible from a public way (e.g., the structure is hidden from view by a wall or shrubbery, the structure is too far from the public way, or interior characteristics and features of the structure are the subject of the easement), the terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features of the property which are preserved by the

easement to the extent consistent with the nature and condition of the property.

Factors to be considered in determining the type and amount of public access required under paragraph (d)(5)(iv)(A) of this section include the historical significance of the donated property, the nature of the features that are the subject of the easement, the remoteness or accessibility of the site of the donated property, the possibility of physical hazards to the public visiting the property (for example, an unoccupied structure in a dilapidated condition), the extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property, the degree to which public access would impair the preservation interests which are the subject of the donation, and the availability of opportunities for the public to view the property by means other than visits to the site.

As a result of these restrictive covenants, the Service held in Rev. Rul. 86-46 that the public was ensured substantial access to the historical and/or architecturally significant buildings, resulting in the organization's purpose qualifying for tax-exemption under section 501(c)(3) of the Code.

Rev. Rul. 86-49 references section 1.170A-14(d)(5)(iv) of the regulations to determine whether the public's access to the property is substantial, given the nature and condition of the property. Although section 1.170A-14(d)(5)(iv) pertains to the issue of public benefit from the standpoint of whether the donor of a constructive easement in a historic and/or architecturally significant building has permitted substantial public access to the building to allow the donor a charitable deduction, these same factors, according to Rev. Rul. 86-49, are germane to the evaluation of public benefit from the standpoint of a tax-exempt organization that receives the donated conservation easement and is required to expend public funds to repair, restore and maintain the historical and/or architecturally significant buildings comprising the conservation easement. In Rev. Rul. 86-49, the buildings were sold to private owners with restrictive covenants, consistent with section 1.170A-14(d)(5)(iv), to guarantee substantial public access. Absent these restrictive covenants guaranteeing public access, it would be difficult for the organization to claim that it was fulfilling a charitable purpose if public funds were used to restore historical and/or architecturally significant buildings primarily for the private benefit of the property owners.

Section 1.170A-14(d)(5)(iv) of the regulations references Example (1) as an example of what facts constitute substantial public access to the exterior and interior façade of a building. Example (1) describes a donation by A of an easement to the exterior and interior of his Victorian period home that he and his family live in. The view of A's home is obscured by a high stone wall. The easement provides that the house may be opened to the general public from 10:00 a.m. to 4:00 p.m. on one Sunday in May and one Sunday in November each year for house and garden tours. The donee organization is given the right to photograph the exterior and interior of the house for use in publications and to permit persons affiliated with educational organizations, professional architectural associations, and historical societies to make appointments to study the property. In this example, the regulations concluded that the two opportunities for public visits per year, when combined with both the ability of the general public

to view the subject of the easement through photography and the opportunity for scholarly study of the property on a reasonable basis, coupled with the fact that the house is used as a family residence, enabled the donation to satisfy the requirement of public access.

The transaction you wish to engage in pursuant to the Amended Agreement is similar to Example (1) in section 1.170A-14(d)(5)(iv) of the regulations. The subject of your Amended Agreement is the "Designated Interior Historic Spaces" of the Building. As in Example (1), your Amended Agreement provides that persons affiliated with educational organizations, professional architectural associations, and historical societies have unlimited opportunities to make appointments to study the Building's interior. Furthermore, as in Example (1), your Amended Agreement provides the public the opportunity to view images of the Building's interior via a virtual tour available on the Club's internet website. However, in several respects, your Amended Agreement goes beyond the public access described in Example (1). Expanding on Example (1), which provided public access to the historic building twice a year as part of house and gardens tours, your Amended Agreement provides the public with the opportunity to view the interior of the Building on six different occasions, with tours scheduled once every two months. Furthermore, your Amended Agreement establishes both a telephone and an internet reservation system, expediting the public's ability to schedule visits to gain access to the interior of the Building. Finally, you will advertise tours of the Building in both the Local Newspaper and via your web site. As such, these conditions create sufficient public access to the Designated Interior Historic Spaces of the Building, with any private benefit to the Club and its members being incidental.

Conclusion:

Accordingly, based upon the information submitted in your ruling request, we rule that your agreement to the terms of the Amended Agreement and the additional representations referenced herein, your performance of those terms and representations, and your acceptance of contributions to be utilized to defray the costs of the preservation and restoration in a manner consistent with the Amended Agreement will not adversely affect your tax exemption under section 501(c)(3) of the Code.

This ruling is made conditional upon paragraph 4 of the Amended Agreement, as described in your submission dated March 19, 2009, and the additional representations referenced herein, being approved by both the National Trust and the Club.

This ruling will be made available for public inspection under section 6110 of the Code after certain deletions of identifying information are made. For details, see enclosed Notice 437, Notice of Intention to Disclose. A copy of this ruling with deletions that we intend to make available for public inspection is attached to Notice 437. If you disagree with our proposed deletions, you should follow the instructions in Notice 437.

This ruling is directed only to the organization that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

This ruling is based on the facts as they were presented and on the understanding that

there will be no material changes in these facts. This ruling does not address the applicability of any section of the Code or regulations to the facts submitted other than with respect to the section 501(c)(3). Because it could help resolved questions concerning your federal income tax status, this ruling should be kept in your permanent records.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter. In accordance with the Power of Attorney currently on file with the Internal Revenue Service, we are sending a copy of this letter to your authorized representative.

Sincerely,

Manager, Exempt Organizations
Technical Group 3

Enclosure
Notice 437